IN THE

Supreme Court of the United States

October Term, 1942

No. 707

BENJAMIN W. FREEMAN,

Petitioner,

v.

BEE MACHINE COMPANY, INC.,

Respondent.

REPLY BRIEF FOR PETITIONER

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1. The removal of a controversy to the Federal Courts does not constitute a waiver on the part of the removing party, to the jurisdiction of the Federal Court over his person. *General Investment* v. *Lakeshore Ry. Co.*, 260 U. S. 261, 269.

Since the above is the law, it would seem evident that the arguments advanced by the Respondent are erroneous wherein it is sought to apply some estoppel against the Petitioner by virtue of his removal of the action. If there could be an estoppel it would surely result in a loss of right to object to the original service, when the removing party submitted himself to the Federal Court of his own volition, as in the *General Investment* case.

2. The only difference between the present cause and that in *General Investment* v. *Lakeshore* (supra), is that here the suit under the Anti-Trust Laws was sought to be filed after the removal, and there the suit under the Anti-Trust Laws was a part of the original complaint. The reasons given by the Respondent in its brief, as to why there should be a different result in the present cause, lies in the contention that procedural rules apply once the case is in the Federal Courts, so that on a procedural basis, the Respondent contends that it has found a way to circumvent the rule in the *General Investment* case.

As we read the decision of the Supreme Court in the *General Investment* case, it not only recognized the existence of a cause of action cognizable by the State Court but reversed the Court of Appeals in dismissing with prejudice the very count of the Plaintiff's petition which had to do with the wrongs alleged to have been committed under laws other than those as to which the Federal Courts had exclusive jurisdiction.

3. The effect of the decision of this Court in *Erie Railroad* v. *Tompkins,* 314 U. S. 64, was to depart from a long line of decisions whereby the Federal Courts passed on what they conceived to be the proper construction of the law of the State where the action arose, as distinguished from adoption of the law as the Courts of that State had construed it. This decision points strongly to the strictly statutory jurisdiction of the Federal Courts, and to the laws of the States as being the controlling factors in controversies arising within the States.

As we view this decision, it would tend to establish that when we speak of a "derivative jurisdiction" in the Federal Courts, we are not speaking of a loose and nebulous thing, but of a jurisdictional rule whereby the rights of parties in removed cases should not be expanded beyond the precise rights given in the States where the litigation

arose originally. The animadversions in Respondent's brief as to the natural control of the Federal Courts over the nationals in this country is directly opposed by the reasoning and the result in the *Erie Rd.* v. *Tompkins* decision.

4. The decision in *Nierbo Co.* v. *Bethlehem Ship Bldg. Co.*, 308 U. S. 165, assists Respondent in no such way as it avers in its brief. The essential basis of that decision was that it concerned the venue of an action—the jurisdiction of the Federal Court over the person of the Defendant. The Court clearly differentiated this from the jurisdiction in the sense of "power to adjudicate," which in line with the controlling reasoning in the *Erie Rd.* v. *Tompkins* case, was stated to be

> 'a grant of authority to them by Congress and thus beyond the scope of litigants to confer."

Hence the acceptance of jurisdiction in the sense of "power to adjudicate" was not lost by Petitioner by his act of removal.

5. The Petitioner by removing to the Federal Court did not bar himself from asserting two things in the present matter: (a) that the Federal Court did not have jurisdiction in any matters to be brought up in the litigation over which the State Court did not have jurisdiction, and (b) that he was in the State Court only in a limited sense, under the laws of the State and hence could not be held responsible beyond that limited sense in the Federal Courts.

Proposition (a) last above made depends on what is meant by "derivative jurisdiction." We contend that it means that the Federal Courts may not have "power to adjudicate" matters which the State Court from which the cause was removed did not have in the action in ques-

tion. Within the large number of authorities in the Respondent's brief we do not find any which contravenes that proposition. There have been a multitude of cases on the point that simply because federal procedure does not permit of a remedy, such as a right to counterclaim, the effect of removal is not to deprive the party of his right. *Partridge* v. *Phoenix Mutual Life Ins. Co.*, 15 Wall. 573, 579 (quoted from by the respondent's brief, p. 33).

In *East Tennessee V. & G. R. Co.* v. *Southern Telegraph Co.*, 112 U. S. 306 (the incorrect page was given in our main brief), the question arose in a removed case as to the right of supersedeas on appeal against a telegraph company in connection with the award in a condemnation case. Under the laws of the State, supersedeas on appeal could not prevent the telegraph company from going ahead with its work. The Supreme Court held that rightly the supersedeas on appeal should have been denied in the Federal Court saying, as we quoted in our main brief, p. 17, that the Federal Courts were clothed with no greater power than the State Court.

We commented on *Rorick* v. *Devon Syndicate*, 307 U. S. 299, in our main brief. In that case, we might additionally note, this Court indicated that the District Court should consider whether under the laws of Ohio, it was proper to extend liability by a subsequent garnishment.

The right to sue and the right to object to being sued are but facets of the same essential privilege. Procedure of the Federal Courts has always been held to be subservient to rights to sue and to object to being sued in removal cases, as established by the laws of the state tribunal where the action was commenced.

(b) The Petitioner was surely in the State Court here only in a limited sense. The Commonwealth of Massachusetts, no doubt, has a right to permit service to be had upon strangers within its gates, in advance of any pleading

having been filed asserting the remedy sought. But in so doing, the State requires that the summons set forth the nature of the action, be it contract or tort. Thereafter, the party served is not responsible in that action for anything sounding in a theory not set forth in the summons.

Thus, Petitioner here was in the courts in Massachusetts in a limited sense only, and not, as the Respondent's brief says, for all purposes. He was in the State courts for such actions sounding in contract as the Respondent might assert against him.

The earliest statement to be found in the law on which the criticism by Mr. Moore in his Federal Practice, p. 3470, is based, to-wit, the case of *Fidelity Trust Co.* v. *Gill Car Co.*, 25 Fed. 737, by Judge Hammond sitting in the Circuit Court at Cincinnati, Ohio, will establish that there was no suit pending against Petitioner here, except one in contract. Besides holding that the federal jurisdiction was derivative, the Court acquiring no jurisdiction that the State Court did not have, Judge Hammond disposed of the argument that the party removing had submitted himself to Federal jurisdiction, by stating that the statute permitted only "suits" to be removed and until there was a suit, there was nothing to remove.

On this reasoning, if a limited service is had in the State Courts, it could not be expanded by removal into the Federal Courts to include a suit as to which no service was had at any time.

If we keep to the same volume of reports, we find a decision by Judge Brewer in *Davis* v. *St. Louis & S. F. Ry. Co.*, 25 Fed. 786, wherein he stated:

> "The removal of a case from a state to a federal court means no appeal. It is simply a change of venue. The decision on a demurrer in that court is a decision in this court. . . ."

Both of these decisions related to the law of 1875.

We urge that Petitioner, not being in court in the State in any other action than an action in contract, did not by virtue of removal, open himself to tort actions by the Plaintiff without new personal service upon him. This, we contend, is not a matter of procedure, but a matter of substantive right, not lost by removal.

6. The respondent stresses the articles by Moore and in the Harvard Law Review by attaching them as an appendix to its brief. We should, therefore, discuss them briefly. Both articles are a discussion of the decision in *Carroll* v. *Warner Bros.*, 20 Fed. Supp. 405. The Law Review Article goes back to Judge Hammond's decision in *Fidelity Trust Co.* v. *Gill* in 25 Fed. 737, and while it refers to the *General Investment* v. *Lake Shore* case, seems to disregard the fact that in that case the defendant was in fact before the State Court. The article says "Where the state court has jurisdiction over the parties and the subject matter," the rationale of the rule by Judge Hammond fails,—whereas the very point involved in the *Carroll* case was whether or not the subject matter of the new complaint, was within the jurisdiction of the State Court as to subject matter. The article then states the rule of convenience indicating that *IF* the defendant were still within the jurisdiction of the Federal Court, he could be served again, under the new cause, and the two be consolidated. Why then should not the consolidation be permitted without a new service? *

This is in substance what Mr. Moore says in his text, also, although Mr. Moore seems to have misconceived the facts in the *General Investment* v. *Lake Shore* case, regarding it as solely involved with an action which was exclusively federal to begin with. Both articles failed to note the presence of jurisdiction over the person of a defendant.

* The answer is that here the petitioner was not still within the jurisdiction of the Federal court and could not be served.

and of a cause of action against the defendant in the State Court, in the *General Investment* case, and both articles considered that in the said case the defendant had not been before the State Court as to a matter within its jurisdiction.

We believe that neither article could have been so expressed if the authors had realized that the *General Investment* decision could be rendered nugatory by the simple expedient of filing the Anti-Trust action over again in the guise of an amendment to the original declaration, if the *Carroll* case was erroneous as indicated.

Mr. Moore also cites *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, but in that case, this Court through Justice McKenna stated in unequivocal terms, that the act of removal would not be construed as an appearance of a defectively served defendant, and that the laws of Mississippi could not make it so. On the same reasoning the petitioner here, served in contract and liable only in contract, could not be held to have waived his right not to be proceeded against in tort whether he had removed the cause or had not.

We should state finally, that it is strange that at no time has the matter of a pleading such as the present one been presented to this Court or any other Court, except in the three instances cited in our brief, which followed after the decision in the *General Investment* case, and which the Court of Appeals in this matter refused to follow.

The reason why this is true is, we suggest, that until the new rules of Civil Procedure, it was not considered permissible to file in the guise of an amendment (except in some jurisdictions other than federal), a completely distinct cause of action without a new service. Thus the practice, where distinct causes of action were added, after the original suit had been begun, was to file them, issue regular service upon them, and ask for a consolidation.

But the Rules of Civil Procedure, while they apply to any cause brought in the Federal courts, by removal or otherwise, are expressly not intended to change the substantive law.

The substantive law applicable to the present matter, as distinguished from procedure, is that by removal petitioner simply submitted the controversy before the State courts to the Federal court, to act as a tribunal in place of the State court, and did not give up his rights (a) not to be sued on a cause of action exclusively Federal, and (b) not to be sued on the basis of the service had upon him, by an action in tort.

For respondent to urge that petitioner by moving for a summary judgment as to the removed action, had entered a general appearance in the Federal Court as to the proposed added claim, neglects the above two points, and further neglects the fact that when petitioner filed the motion for Summary Judgment there was no such added claim filed, as is now proposed.

Respectfully submitted,

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